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Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

No._____

IN THE
Supreme Court of the United States
OCTOBER TERM 1987

JAMES MALCOLM WILLIAMS,

Appellant,

vs.

LAWYERS PROFESSIONAL
RESPONSIBILITY BOARD,
STATE OF MINNESOTA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF
MINNESOTA

JURISDICTIONAL STATEMENT

JAMES MALCOLM WILLIAMS
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QUESTION PRESENTED

Whether DR7-106(C) (1), (2), (5), (6) and (7), Code of Professional Responsibility, State of Minnesota, and Rules 3.5(h), 4.4 and 8.4(d), Minnesota Rules of Professional Conduct, are violative of the free speech clause of the First Amendment to the United States Constitution (and/or are violative of the due process and equal protection clause of the Fourteenth Amendment to the United States Constitution) when applied to publicly reprimand and suspend a lawyer from the practice of law for six months for the use of non-obscene language and for aggressive cross-examination, there being no claim of dishonesty,* incompetence, misrepresentation, over-reaching, fraud or any activity impinging on the rights of his clients or proof of any activity impinging on the public interest.

* The Referee specifically stated that the allegedly improper speech ". . . is

not caused by either dishonesty or incompetence . . . " and the Referee further admitted that he was concerned, without evidence other than a bare transcript, with ". . . the lawyer's state of mind . . ." See Memorandum, Pp. 35a and 36a infra.

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American Civil Liberties Union, "The Rights of Lawyers and Clients, a Civil Liberties Handbook, Avon, 1979. 22,27

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5 Harv. Civil Rights, Civ.Lib.Law Rev.,1970, Pp.301-392 32

31 Hastings Law Journal, Part 2, May,1980,Pp.1097-1138 25,30

JAMES MALCOLM WILLIAMS, Appellant,

v.

LAWYERS PROFESSIONAL RESPONSIBILITY BOARD, STATE OF MINNESOTA, Appellee.

JURISDICTIONAL STATEMENT

James Malcolm Williams, the appellant, appeals from the final judgment of the Supreme Court of the State of Minnesota, dated October 23, 1987, holding that Code of Professional Responsibility, State of Minnesota, DR7-106(C) (1), (2), (5), (6) and (7) and Rules 3.5(h), 4.4 and 8.4(d), Minnesota Rules of Professional Conduct, as applied in this case, are not unconstitutional, as being violative of appellant's right to free speech guaranteed by the First Amendment to the United States Constitution and/or the appellant's right to due process and equal protection guaranteed by the Fourteenth Amendment to the United States Constitution. See also, Middlesex

County Ethics Committee v. Garden State Bar Association, etal., 1982, 457 U.S. 423.

OPINIONS BELOW

The opinion of the Supreme Court of Minnesota, which appears in the appendix herein, P. 1a infra, is reported at 414 N.W.2d 394 (1987).

The findings of fact, conclusions of law and recommendation and memorandum of the Referee by appointment of the Minnesota Supreme Court, dated the 18th day of December, 1986, are not reported. They are reprinted in the appendix herein at P. 19a, infra.

JURISDICTION

The judgment of the Supreme Court of the State of Minnesota publicly reprimanding the appellant for unprofessional conduct and suspending him from the practice of law in Minnesota for six months was entered on October 23, 1987. See P. 1a.

A supplementary notice of appeal to this Court was timely filed in the Supreme Court

of Minnesota on January 13, 1988.

This appeal is being docketed in this Court within 90 days from the date of the judgment below. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(2).

CONSTITUTIONAL PROVISIONS AND RULES

First Amendment, United States Constitution:

> "Congress shall make no law . . . abridging the freedom of speech . . ."

Fourteenth Amendment, United States Constitution:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of . . . property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

DR7-106(C) (1), (2), (5), (6) and (7), Minnesota Code of Lawyers Professional Responsibility:

> "In appearing in his professional capacity before a tribunal, a lawyer shall not:
>
> (1) State or allude to any matter that he has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence.

(2) Ask any question that he has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person.

. . .

(5) Fail to comply with known local customs of courtesy or practice of the bar or a particular tribunal without giving to opposing counsel timely notice of his intent not to comply.

(6) Engage in undignified or discourteous conduct which is degrading to a tribunal.

(7) Intentionally or habitually violate any established rule of procedure or of evidence.

Minnesota Rules of Professional Conduct, Rule 3.5:

"

ADVOCATE

Rule 3.5 Impartiality and Decorum of the Tribunal.

(h) A lawyer shall not engage in conduct intended to disrupt a tribunal."

Minnesota Rules of Professional Conduct, Rule 4.4:

"

TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS

Rule 4.4 Respect for Rights of Third Persons.

In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay or burden a third person, or use methods of obtaining evidence

that violate the legal rights of such a person."

Minnesota Rules of Professional Conduct, Rule 8.4(d):

"

MAINTAINING THE INTEGRITY - OF THE PROFESSION

Rule 8.4 Misconduct.

It is professional misconduct to:

. . .

(d) Engage in conduct that is prejudicial to the administration of justice;

. . ."

HOW THE FEDERAL QUESTION WAS RAISED

At the earliest stages of the disciplinary proceedings below, the appellant raised the claim that the rules cited herein, and their application to him in this case, were violative of the First and Fourteenth Amendments to the United States Constitution. This claim was raised in correspondence with the appellee in December of 1984 and at all stages subsequent thereto including preliminary motions to the appellee's panel, the District Court of Ramsey County,

Minnesota, preliminary application for writs to the Supreme Court of Minnesota, application for temporary restraining order and permanent injunction to the U. S. District Court for the District of Minnesota, Civil File No. 4-85-1570, the answer to the formal complaint, the hearing before the referee, and the memorandum of law filed after the referee's hearing but before his decision. See P. 9 of Findings of Fact, etc., Pp. 33a-34a, infra. The opinion of the Supreme Court of Minnesota indicated that the appellant was not deprived of his First and Fourteenth Amendment rights and that the rules cited above were constitutional as applied. See opinion below, Pp. 7a-18a, infra. The Minnesota Supreme Court and its appointed referee thus considered and expressly rejected the federal constitutional claims made herein.

STATEMENT OF THE CASE

The appellant, James Malcolm Williams,

was admitted to the practice of law in Minnesota in 1952. At all times material herein, he has maintained his principal law office in Minneapolis, Minnesota but is also admitted to practice in several jurisdictions throughout the United States including this Court.

In December of 1984, the appellee initiated an investigation of the appellant's "conduct" while the appellant was representing the plaintiffs in the case of Sievert v. First National Bank in Lakefield, etal., 385 N.W. 2d 409 (Minn. App. 1984). After a series of complicated preliminary steps, a petition for disciplinary action was filed by the appellee in the Supreme Court of Minnesota in December of 1985, alleging that the appellant was guilty of ". . . unprofessional conduct warranting public discipline . . . " citing portions of transcripts of the Sievert trial, discovery deposition in the Sievert case and proceedings

before the appellee's panel, and further alleging that the contents of the transcripts standing alone (mere words taken out of context) constitute violations of the rules cited supra, justifying professional discipline.

In condensed form as finally presented to the Minnesota Supreme Court, the petition contained 3 counts: Count I involved aggressive cross-examination; Count II is a colloquy between counsel at a discovery deposition; and, Count III is a colloquy between the appellant and the appellee's panel chairman. For pertinent portions of this complaint, see referee's Findings of Fact, etc., and Memorandum, commencing at Pp. 19a, infra, and opinion, commencing at Pp. 1a, infra.

The language used and the questions asked were neither obscene nor disruptive of any proceedings. At no time during the entire proceedings did the appellee offer any

evidence of whatsoever nature to support its charges against appellant other than transcript citations.

In Count I, the cross-examination of a former Minnesota Supreme Court Chief Justice and a defendant-attorney charged with malpractice was designed to aid the jury in determining the weight to be given the testimony of the witnesses. The subject matter of the questions did, however, involve corruption, both in the judiciary and in the legal profession. See, opinion, Pp. 2a-11a, infra.

Count II involves the colloquy at a discovery deposition, which was precipitated by a physical threat from another attorney to the appellant's client. This threat was terminated when the appellant told the other lawyer not to ". . . use your little sheeny Hebrew tricks . . ." See, P. 12a, infra, opinion of Minnesota Supreme Court.

The third count involves a colloquy between the appellee's panel chairman and the appellant at a hearing which the appellant was compelled to attend even though his lawyer was in court on another matter in another city. Because the panel chairman was considered to be prejudiced due to his extensive involvement with the banking industry in Minnesota and other factors, the appellant considered the hearing to be a sham. An unsuccessful application had been made to the U. S. District Court for a temporary restraining order to assure a fair hearing. The subject colloquy occurred largely because the panel chairman had ordered the appellant to sit down and shut up before the appellant had completed his response to the charges. Thereafter, the panel chairman announced the decision, thus making a sham of the entire hearing. The colloquy then followed:

> "So the decision that you have made today to hold me up to public ridi-

> cule and scorn in front of my clients, in front of judges, in front of lawyers, without any evidence at all, is a disgrace to the legal profession, and precisely, sir, that is what I consider you to be.
>
> I don't think you are aware of the United States Constitution. I don't think you are aware of due process. I don't think you know the difference between substantive and *due process. I don't think you know the right of free speech, and I -- you're smiling because you have, you have, fundamentally deprived me of my rights, and you are proud of it. And that is why I say, I consider you a disgrace to our profession. (* procedural in)

See opinion below, Pp. 14a-15a, infra.

The relevant facts that led to this charge, while contested in various respects, may be fairly summarized as follows:

(1) For over 30 years preceding the events that led to the opinion of the Minnesota Supreme Court in 1987, the appellant had been a prominent, independent attorney with a long-established reputation of opposing the special interest power structure. E.G., For years one of the appellant's verdicts was listed in the Guinness World Book

of Records as the largest ever returned in a libel action in favor of an individual. The verdict was against a foundation whose trustees were members of the Minnesota Supreme Court and involved venality in medical research. The members of the Minnesota Supreme Court disqualified themselves and appointed their own replacements who promptly set that verdict aside.

(2) The appellant had consistently fought prejudice, corruption and incompetence in the bar association, among politicians, judges, bankers, insurance companies, the medical profession, the chemical industry and the religious and financial communities when the rights of common citizens were being trampled.

(3) The appellant's practice is not confined to Minnesota and has involved such things as a national effort to impeach the President of the United States for exceeding constitutional restraints on his war-

making powers.

(4) In the course of a long and colorful legal career, the appellant has made many enemies in the established power structure - both inside and outside the State of Minnesota - so that his public reprimand and suspension for unprofessional conduct serve as a warning to independent lawyers supporting unpopular causes and representing ordinary citizens.

(5) The earliest antecedent to the specific proceeding involved in this appeal occurred when the attorneys representing the defendants bank and the bank's lawyer in the Sievert case, supra, decided to attempt to have the appellant removed as the plaintiff's attorney. This decision was made by the banks and their attorneys early in the Sievert, supra, case prior to trial.

A) Multiple lawsuits were filed against the appellant's clients on behalf

of the defendant bank on the same issues as in the Sievert case.

B) Threatening letters were sent to the Sievert creditors.

C) The promissory note of the client's father was called by the defendant bank as an additional coercive maneuver.

D) The bank's attorneys threatened to call the appellant as a witness to get him off the case. (Generally, Minnesota requires that attorneys who are called as witnesses must withdraw as trial counsel.)

E) The defendant bank's attorney, Charles Cox, then made use of his personal relationship with a former employee (who was then the appellee's Director) in the filing of artifically contrived "ethics" complaints against your appellant, one of which is involved herein as Count II. (There, the bank's lawyers, Cox and William Rosen, had staged an incident during

the taking of a discovery deposition referred to above. The appellant's representation of Sievert was continually harassed and intimidated before trial by that complaint as it slowly wound its way through the disciplinary process.

6. The trial of the Sievert case resulted in a large verdict against the bank and, including a substantial offset of Sievert's non-contested indebtedness, had a value to Sievert of nearly $500,000.00.

7. The trial judge denied a motion for a new trial and affirmed the judgment prior to an appeal by the defendants.

8. The Minnesota Bankers Association was allowed to file an amicus curiae brief, in substance asking for the precise decision that was rendered by the Court of Appeals. The appearance of the Minnesota Bankers Association as amicus curiae mysteriously disappeared from the caption of the case and was neither mentioned nor noted

in the opinion.

9. The Minnesota Court of Appeals followed the Bankers Association brief and set the judgment aside and did not allow a new trial claiming, without evidence or justification, that Sievert could not prove damages. The appellate court then proceeded to castigate the appellant as pure dicta, primarily because of his cross-examination of former Chief Justice Sheran.

10. The trial judge refused to testify against the appellant in the disciplinary proceedings although he was contacted by the appellee and he received a written request to be of aid to the appellee.

11. The appellee claimed that the only reason the investigation was made and the complaint filed was because of the appellate court's castigation mentioned above.

12. The appellee offered no evidence at the hearing before the referee other than transcripts and requested, without

evidentiary justification, a six-month suspension. The referee recommended the public reprimand and the six-month suspension which was followed by the Minnesota Supreme Court. See opinion, P. 18a infra, and findings of fact, etc., P. 34a infra.

The Minnesota Supreme Court did not explain why appellant's "conduct" (language) constituted ethical violations nor did it resolve in any way the applicability of the rules cited supra to the facts of this case. The appellant had repeatedly asked the appellee at all stages of the proceedings to explain why it contended his questions and speech constituted violations and to show the appellant the applicability of the rules to the facts of this case. The appellee has, at all times, refused this information and has strenuously and successfully resisted any attempt by the appellant to compel this information by an appropriate court order.

THE QUESTION IS SUBSTANTIAL

This Court has held that lawyers are entitled to First and Fourteenth Amendment protection as are other citizens. In re Ruffalo, 1968, 390 U.S. 544. Certainly, a citizen who is represented by an attorney and who delegates his right to free speech to that attorney cannot be indirectly deprived of his constitutional rights by "operation of law" or implied waiver simply because he has an attorney representing him. The deprivation nevertheless occurs through the extension of restrictions on freedom of speech placed on his attorney by the threat and application of vague and indefinite lawyers disciplinary rules, a sort of deprivation by association. See, esp. American Civil Liberties Union, "The Rights of Lawyers and Clients, a Civil Liberties Handbook", Avon, 1979.

To the best of our knowledge, this Court has not previously decided this overwhelm-

ingly important question - a question that has as its essence the deprivation of corollary, dependent constitutional rights of the public as clients of members of the legal profession.

To what extent does an attorney give up his First Amendment rights under the strictures of legal ethics? Stated another way, with proper emphasis on the interests and rights of the attorney's client, what are the punishable limits on an attorney's verbal advocacy by the application of lawyers disciplinary rules with due regard for the First Amendment rights of both the attorney and his clients who have delegated their First Amendment rights to free speech to the attorney of their choice on condition that he zealously represent them?

The importance of this issue is magnified further then we consider that our civilized system of justice requires the peaceful settlement of disputes in the

courts and further requires the citizen to delegate his First Amendment rights to speak his mind to the officers of the court (i.e., his attorney). That system of justice then attempts to restrict and deprive the citizen of those rights by threatening to and imposing sanctions on the attorneys for the exercise of free speech.

The clear implications of the restrictions on attorney's free speech imposed by the Minnesota Supreme Court's judgment below threatens the fundamental constitutional rights of all attorneys and their clients and thereby constitutes an erosion of public confidence in our system of justice. The restrictions undermine the essence of the attorney-client relationship, i.e., confidence and confidentiality. It makes a mockery out of the free choice of counsel, for how can an ordinary citizen know the nature, extent and effect of this threat of professional punishment on the law-

yer he chooses. See, esp. 31 Hastings Law Journal, Pt. 2, May, 1980, Pp. 1097-1138 @ 1098:

> ". . . A lawyer should not be compelled to weigh every word . . . The public interest is not served but rather stymied by a purged and policed profession homogenized into a bovine herd adhering in its every word and deed to some lowest common denominator of innocuousness. . ."

The Minnesota decision **serves** as a warning to all lawyers, especially those who make claims against or sue the rich and powerful, that they can be punished by the loss of the clients and their livelihood if someone with influence doesn't like what they say or write. It forces attorneys appearing on behalf of others to be <u>more</u> concerned about the effect of the language they use <u>than they are</u> about the rights of their clients. It thus chills, impairs, restricts and frightens lawyers, even those who, notwithstanding the rules, attempt in good faith to zealously, honestly and competently rep-

resent their clients. The decision rewards, by clear inference, attorneys who fawn no matter what improprieties, incompetence or corruption they may be facing. The effect is to tell the public that you do not have the right of free choice of an attorney but you must retain an innocuous lawyer of whom we approve. Obviously, the decision will be effective in preventing attorneys from actively criticising error, dishonesty or incompetence in the administration of justice. It is unlikely that, if this decision stands, there will be any public criticism or public revelations by practicing attorneys involving the judicial system because the Minnesota decision affirms the exercise of autocratic and essentially unrestricted power of suspension of independent lawyers.

Because of its wide dissemination in the legal community, the decision has had and will continue to have national prominence and a deleterious effect. Also its effect

is increased for nearly all of the states in our country have disciplinary rules that are either identical or comparable to the rules involved herein. Therefore, the substantial federal questions presented here are truly national.

The importance of this Court's establishment of a clear constitutional standard cannot be overemphasized. The use of "ethical rules" to indirectly deprive citizens (clients) or the public at large of free speech has never been analyzed in depth by this Court or any other court in the United States to the best of our knowledge. See, for example, In re Snyder, 1985, 105 S. Ct. 2874 and Middlesex County Ethics Committee v. Garden State Bar Association, etal., 1982, 457 U.S. 423.

The American Civil Liberties Union proposed such a standard, cited supra, at P. 143, to-wit: In order to be subject to regulation, an attorney's language must be

> ". . . so outrageous that it unmistakenly established by its own presence both intent and obstruction (of justice) . . . must be sufficiently obstructionist to interfere with the administration of justice . . . the obstruction of justice must be actual and not theoretical."

This Court reiterated a possibly applicable standard in In re Little, 1972, 404 U.S. 533, which was first stated in 1947 and then again in 1958, that the language complained of

> ". . . must constitute an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or not even probable; it must immediately imperil . . . the law . . . is not made for the protection of judges who may be sensitive . . . Courts must be on guard against confusing offenses to their sensibilities with obstruction to the administration of justice . . . " (Emphasis, ours.)

Because of the constitutional implications implicit in the unique delegation of their rights to free speech (and due process) by American citizens to their attorneys, we respectfully suggest that there

is a great national need for the establishment of boundaries for the restrictions imposed by "ethical" rules. These boundaries must be established in such a way as to be clear and definite to both the client and his attorney before the citizen delegates his constitutional rights to the attorney. The application of these rules in that area of free speech amounts to "prior restraint". Therefore, for that reason alone, the standards of prohibitive speech must be clearly enunciated in the rules. See In re Ruffalo, supra.

Constitutionally, this Court cannot tolerate the continued use of "notoriously ambiguous and obscure" rules as a mechanism to regulate free speech under the guise of "unethical conduct" by imposing sanctions upon an attorney in his representative capacity.

As the Hastings Law Journal, supra, pointed out:

> "The rules which lawyers have written for themselves[8] are notoriously ambiguous and obscure . . . The import of many of the rules is extraordinarily unfair. The resulting interpreting elasticity confers enormous discretionary power on the officials who enforce attorney discipline. . .
>
> ---
>
> [8]More accurately, they are the rules which a few lawyers - mainly representing the corporate elite - have written for all. See J. Auerbach, Unequal Justice, 1976, 40-53; Schuchman, Ethics and Legal Ethics: The Propriety of the Canons as A Group Moral Code, 37 George Washington Law Review, 244, 1968."

31 Hastings Law Journal, supra, @ 1098.

Regulation of attorneys and, indirectly, their clients has been expanding in quantum leaps in the last few years. It is not surprising that this bureaucratic cancer is now growing in the vital organ of free speech. The use of ethical rules and sanctions as devices to regulate free speech is creating a new exception to the First Amendment right to free speech applicable only to lawyers and their clients. There are indications in In re Snyder, supra, and Middlesex, supra,

that some members of this Court will allow this new exception. Therefore, appellant suggests the adoption of the following standards as a constitutional prerequisite:

1. Before ethical standards such as public censure, suspension or disbarment can be imposed upon an attorney for alleged professionally improper speech, the appropriate agencies must adopt a rule which specifically authorizes the regulation of speech by that agency as "ethical conduct".

2. The language used which is contended to be forbidden under the guise of "ethical conduct" must be of such a reprehensible nature as to amount to an act of professional dishonesty intended to pervert justice such as is accomplished by bribery of a judge, a juror or witness or the willful preparation and submission of false evidence.

3. The attorney charged must have intended by what he said to pervert or interfere with due process of law. (i.e., the

constitutional administration of justice.)

4. The language used must in fact (a) have interfered with the administration of justice and (b) be proven by the complaining agency by clear and convincing evidence. Mere recitation of language, no matter how subjectively offensive, does not and cannot constitute proof of an ethical violation if the language is otherwise protected under the First Amendment right to free speech.

5. Finally, there should be some reasonable showing that the trial court or other judicial officer in charge of the proceeding or before whom the attorney was appearing was unable to properly discipline or control said attorney by the use of contempt powers, fining, incarceration, conditional probation or other control devices.

As was pointed out in 5 Harvard Civil Rights, Civ. Lib. Law Rev., 1970, Pp.301-392,

"It has become professionally and

> legally dangerous to be a lawyer representing the poor, minorities and the politically unpopular.
>
> . . .
>
> The role of the bar association as prosecutor rather than protector of lawyers with unpopular clients and as defender of the status quo rather than reformer of it has deep and varied roots. This comment will explore the role that bar associations and courts have played in shaping the lawyers mold and punishing those who reject it and will suggest certain criteria for curbing their power to limit the freedom of individual lawyers.
>
> . . .
>
> Important tools for preserving the bar's image are vague statutes and court rules with 'catch-all' phrases designed to regulate the conduct of attorneys without clearly defining the prohibited behavior. . . " (Emphasis, ours.)

Unless this Court notes probable cause, the Minnesota Supreme Court's judgment will stand as authorization to professional disciplinary groups to continue to use vague ethical rules as justification for censorship of independent lawyers and their clients.

To the independent lawyer, it will say - You speak at your own peril of professional destruction if you are zealous in the representation of your clients against powerful

vested interests.

To his clients, it will say - You subject yourself to a loss of your rights to free speech when you are represented by an attorney. You accept effective, total censorship by delegating this right to your lawyer. Moreover, you give up your rights to free speech to an attorney who is subject to public censure, suspension or disbarment for the use of language that is "unacceptable". Your lawyer's speech will be designed primarily to insure his professional livelihood and only secondarily to serve your interests. An intolerable conflict of interest!

Justices Douglas and Black left a legacy that establishes the importance of the question presented here. Justice Douglas remarked in a letter he sent to a publisher in 1976 that creeping censorship in the modern world is a tool for the suppression of dissent

> ". . . just as heresy was the tool used by ecclasiastical power . . ."

to suppress dissent in the past. Justice Douglas stated,

> "Those in power (consider it to be) dangerous . . . to traffic in ideas . . ."

Douglas Letters, Melvin I. Urofsky, Adler & Adler, 1987, P. 160, Ft.nt. 1.

Both Justices Douglas and Black understood and appreciated that the First Amendment

> ". . . enjoyed a preferred position in the pantheon of constitutional values, because without freedom of expression, the core of all First Amendment rights, all other liberties meant nothing. . ."

Douglas Letters, supra, Ft.nt. 2 @ 196.

Justice Douglas wrote,

> ". . . The First Amendment sets us apart from most other nations. It marks the end of all censorship; it allows the ability of the mind to roam at will over the entire spectrum of ideas and the sanctity of one's beliefs . . . A symbol of our (national) health is the respect we show to First Amendment values . . . "Ibid, 196.

Because, in our country, we ask our citizens to place their trust in our judicial system to such an extent that they delegate their precious First Amendment rights to their attorneys, our courts should be the temples for those rights and the legal profession the high priesthood.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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Appellant

January 18, 1988

APPENDIX

STATE OF MINNESOTA
IN SUPREME COURT
C8-85-2307

Supreme Court — Per Curiam

In Re Petition for Disciplinary Action against James Malcolm Williams, Attorney at Law of the State of Minnesota.

Filed October 23, 1987 Office of Appellate Courts

SYLLABUS

For unprofessional conduct at a pretrial deposition, during a long jury trial and at a disciplinary panel hearing on probable cause, the respondent attorney is publicly reprimanded and suspended for 6 months.

Heard, considered, and decided by the court en banc.

OPINION

PER CURIAM.

The Director's petition for disciplinary action against respondent attorney James Malcolm Williams alleges three counts of professional misconduct: Count I, mis-

behavior occurring during the Sievert trial;[1] Count II, misconduct occurring during a pretrial deposition in the Sievert case; and Count III, disruptive conduct at a probable cause hearing before a panel of the Lawyers Professional Responsibility Board. The referee, the Honorable William A. Johnson, found respondent's conduct during the pretrial deposition merited a public reprimand and that the respondent's misconduct on the other two occasions warranted 6-months' suspension. Respondent requested a copy of the transcript of the referee's hearing; consequently, the referee's findings are not conclusive under Rule 14(d). We conclude a public reprimand and 6 months' suspension are warranted.

A.

Count I

[1] The Sievert case is reported in Sievert v. First National Bank in Lakefield, 358 N.W.2d 409 (Minn. App. 1984), pet. for review denied (Feb. 5, 1985).

In the summer of 1982, respondent represented plaintiffs, Mr. and Mrs. Sievert, in a lawsuit against the First National Bank of Litchfield (sic) and attorney David Meyer, for losses incurred in a failed golf course venture. The referee found that respondent, throughout the 6-week-long trial and notwithstanding the admonitions of the trial judge, repeatedly asked improper questions that were either argumentative, irrelevant, or repetitive, or which assumed facts not in evidence nor reasonably likely to be put in evidence, or which were designed to degrade the witness.[2] The 2,900-page trial transcript

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[2]The disciplinary rules found to have been violated were:

Rule 3.5(h): "A lawyer shall not engage in conduct intended to disrupt a tribunal."

Rule 4.4: "In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person,***."

Rule 8.4: "It is professional misconduct for a lawyer to * * * (d) engage in conduct that is prejudicial to the administration of justice,

clearly and convincingly supports the referee's findings.

During the respondent's cross-examination of witness David Meyer, respondent's questions were repeatedly argumentative[3] or without foundation,[4] or attempted to characterize unfairly the witness' testimony,[5] or were crude attempts to demean the witness.[6]

---

[3]For example,

"Q. [By Mr. Williams]. OK, so you know that he [Sievert[wasn't buying it to farm it?

"A. [Mr. Meyer]. I didn't mean to suggest that.

"Q. Well, you mean to suggest that you don't want to admit that you knew he was going to try to build a golf course?

(T. 98).

[4]For example, Mr. Meyer testified that between 1973 and 1975 the bank had paid his firm an annual retainer of $25 but that it was not his practice to send the bank a bill showing services to which the retainer was applied. Mr. Williams then asked: "Q. Well, you weren't receiving money under the table so you didn't have to report it to your partners, were you?" (T.85).

[5]Mr. Williams interrupted Mr. Meyer's

Respondent's cross-examination of witness Robert J. Sheran is another example. Mr. Sheran, a former chief justice of this court, testified as an expert for defendant Meyer on the standard of care required of an attorney. On cross-examination, respondent inquired about the real party in interest status of liability insurers in personal injury litigation where the insurer retains counsel to represent the insured. The referee thought the form of

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5 cont'd. appropriate answer to a question by stating: "Your Honor, I am objecting to the witness continuing to be a salesman on the stand." (T.249). In response to other answers by Mr. Meyer, respondent commented that the witness was "editorializing" (T.267), or his answer was "sales talk" (T.258). At one point, after Mr. Meyer had answered the question and the court so ruled, respondent stated: "Your Honor, I don't wish to comment on his testimony because I don't want to get the Court's ire up anymore than we have already done in the past, but I do feel * * * the witness he refused * * *he has refused to respond to simple direct questions with simple direct answers * * *and I would once again ask the Court to instruct the witness * * *." (T.366). We might note, too, respondent would interrupt a responsive answer by Mr. Meyer and, when told

the question was improper but did not rise to the seriousness of a disciplinary violation. We disagree. Respondent was free to explore the arguably anomalous status of insurance defense counsel insofar as relevant, but what was abominable was respondent's converting this inquiry into a false personal attack on the witness.[7]

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5 cont'd. to let the witness answer, would withdraw the question (T.248). When, later, defense counsel sought to cross- examine Mr. Sievert, respondent would repeatedly interrupt with improper objections and remarks.

[6] In cross-examining Mr. Meyer after his direct testimony, respondent elicited that Mr. Meyer had attended a religious college and received a degree in philosophy. He asked whether the witness had developed a "philosophy of your own that is different from the philosophy of ordinary Christian ethics," and, when Mr. Meyer answered he had not, then asked, "So you still consider yourself a Christian?" (T. 1984) and "Are there any circumstances under which you would lie, Mr. Meyer?" (T.1986).

[7] "Q. [Mr. Williams]. And yet you went through case after case for a number of years as a former FBI agent, knowingly misrepresenting to the juries time

An argumentative question is improper and unfair because it argues the evidence rather than seeking to elicit evidence from the witness. Argument is reserved for counsel to make, not to the witness, but to the trier of fact after the facts are adduced. During the stress of a trial, for one reason or another, it may happen that argumentative questions will be asked, but the trial judge is ordinarily able to handle the situation by sustaining an objection, striking improper remarks, or cautioning

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7 cont'd. and time again that you were representing an individual when in truth in fact you were representing an insurance company?" (Emphasis added.)

"A. [Mr. Sheran]. That statement is false and scandalous."

(T. 2369). See Sievert v. First National Bank in Lakefield, 358 N.W. 2d 409, 416 (Minn. App. 1984), for a further excerpt of the Sheran cross-examination.

the jurors.

But here respondent's questioning went far beyond what is excusable or tolerable. Almost every page of the transcript of respondent's cross-examination of Mr. Meyer shows improper questioning, which in turn led to inevitable objections by opposing counsel, conferences at the bench or in chambers, confusion, posturing before the jurors, and a record tainted with unfounded insinuations and innuendo. The trial judge exercised patience and fairness in an effort to keep the trial in hand, although several times he was close to granting a mistrial. Aware that the jury had heard his remarks even though the judge had sustained an objection or ordered the remarks stricken, respondent continued undeterred. Respondent, we conclude, engaged in calculated trial tactics to provoke and bait opposing counsel, intimidate and demean witnesses, and obfuscate the record. To corrupt the trial process in

this manner is prejudicial to the administration of justice and is unprofessional conduct.

Respondent asserts he has a right, indeed an obligation, to represent his clients vigorously, aggressively, and zealously. To be vigorous, however, does not mean to be disruptively argumentative; to be aggressive is not a license to ignore the rules of evidence and decorum; and to be zealous is not to be uncivil.

Respondent argues his conduct was an exercise of free speech and to impose discipline would be unconstitutional censorship and would chill effective representation of clients. Respondent would misapply the first amendment. Outside the courtroom the lawyer may, as any other citizen, freely engage in the marketplace of ideas and say all sorts of things, including things that are disagreeable and obnoxious. See, e.g., In re Justices of the Appellate

Division, 33 N.Y.2d 559, 301 N.E.2d 426, 347 N.Y.S.2d 441 (1973) (attorney not subject to discipline for an out-of-court statement); Polk v. State Bar of Texas, 374 F. Supp. 784 (N.D.Tex.1974) (a reprimand for statements made by an attorney outside his professional capacity would violate his first amendment rights). But here respondent was in the courtroom, an officer of the court engaged in court business, and for his speech to be governed by appropriate rules of evidence, decorum, and professional conduct does not offend the first amendment. See In re Getty, 401 N.W.2d 668 (Minn. 1987) (attorney subject to discipline for rude, loud, and disrespectful conduct during court proceedings). Respondent cites In re Snyder, 472 U.S.634 (1985), where the Supreme Court held that an attorney's criticizing the administration of the Criminal Justice Act did not warrant discipline. The Court did not,

however, decide the case on constitutional grounds but simply held that the attorney's conduct was not "inimical to the administration of justice." Id. at 645. Indeed, the court went on to say, "The license granted by the court requires members of the bar to conduct themselves in a manner compatible with the role of courts in the administration of justice." Id. at 644-45.[8]

Count II

At the pretrial deposition of Howard Sievert

[8] Any number of cases support restraints on in-court conduct of lawyers to preserve the administration of justice. E.g., Matter of Stanley, 102 N.J. 244, 507 A.2d 1168 (1986) (undignified and discourteous conduct degrading to the tribunal and prejudicial to the administration of justice warranted public reprimand); In re Vincenti, 92 N.J. 591, 458 A.2d 1268 (1983); Cincinnati Bar Ass'n v. Gebhart, 69 Ohio St.2d 287, 431 N.E.2d 1031 (1982) (attorney suspended for outrageous in-court conduct as well as reprehensible behavior towards witnesses and opposing counsel out-of-court). Respondent cites Robert C. Black, Attorney Discipline for "Offensive Personality" in California, 31 Hastings L. J. 1097 (1980), but we find nothing in that article to support respondent's position.

Sievert, in August 1981, a dispute arose between counsel whether the witness could review a pleading while being asked questions about it. This then occurred:

> Mr. Rosen: If you're going to hand the complaint to him to coach him we are going to see the Judge.
>
> Mr. Williams: Just get your foul odius body on the other side.
>
> Mr. Rosen: Then don't show the witness anymore -
>
> Mr. Williams: I'm giving the witness the Complaint -
>
> Mr. Rosen: You're not entitled to coach the witness any further, you're not entitled to -
>
> Mr. Williams: Don't use your little sheeny Hebrew tricks on me, Rosen.
>
> Mr. Rosen: Off the record -
>
> Mr. Williams: No, on the record.
>
> Mr. Rosen: You son of a bitch.
>
> Mr. Cox: Let's call a recess.
>
> Mr. Rosen: Tell the Judge I called him a rotten son of a bitch for calling me a sheeny Hebrew and I want to go see the Judge right now.

The referee found that respondent intentionally used a racial slur, thus violating

DR7-106(C)(5) and (6) of the Code.[9] We agree. Indeed, the violation is so clear that, as the referee stated, "It needs no discussion." Respondent argues that imposition of discipline for this breach of professional conduct denies him the equal protection of the law because opposing counsel was not subjected to disciplinary action for his offensive comments toward respondent. This argument is without merit. Respondent overlooks the lack of provocation for his own remarks and the understandable provocation for opposing counsel's response.

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[9] On April 9, 1982, the Director's office issued a private warning to respondent for his deposition conduct but respondent refused to accept it. The Director, citing a need to use his limited resources elsewhere, withdrew the warning. The incident was subsequently revived for inclusion with the Sievert trial charges. Respondent objects to the revival but this is permitted under Minn. R. Prof. Resp. 19(b)(1).

Count III

On November 20, 1985, a hearing was held before a panel of the Lawyers Professional Responsibility Board to determine whether there was probable cause for disciplinary proceedings on respondent's conduct at the Sievert trial.

The referee found that respondent repeatedly engaged in obstreperous, disruptive and abusive conduct at the panel hearing. The referee found respondent's behavior to be "outrageous and inexcusable". As had the referee, we have read the transcript and listened to an audio tape of the hearing, and we conclude the referee's findings are amply supported by the evidence. To cite just one instance, after the chairman had told respondent to stop talking, he persisted in continually interrupting the chairman, finally accusing the chairman of lying when the chairman said respondent was argumentative and in-

terrupting. After the panel found probable cause, respondent stated that he considered the panel chairman, a lawyer, "a disgrace to our profession." One can only conclude respondent was intentionally seeking to disrupt the panel proceedings. His conduct violated Rule 3.5(h), Rule 4.4, and Rule 8.4(d) of the Minnesota Rules of Professional Conduct.

B.

Respondent's other defenses are without merit. The director's petition, referring to each place in the trial transcript where misconduct is claimed and citing the disciplinary rules alleged to be violated, set out the charges at the petition stage with sufficient specificity. See In re N.P., 361 N.W.2d 386 (Minn. 1985) reh'g denied, appeal dismissed, 474 U.S. 976 (1985). Respondent was not denied a right to confront his "accusers" by not being allowed to question Judge Foley, who wrote the appellate

opinion in Sievert, and Director Wernz, who filed the disciplinary petition. Neither had any firsthand knowledge of the alleged misconduct and there was no showing they had any information material to the charges. See State v. Turner, 217 Kan. 574, 538 P.2d 966 (rejecting a similar confrontation argument). Respondent was not denied counsel at the panel hearing. Finally, the claim that the disciplinary rules are constitutionally vague was rejected in In re N.P., supra.

The remaining question is what discipline to impose. In In re Getty, 401 N.W. 2d 668 (Minn.1987), we publicly reprimanded an attorney for rude and disrespectful conduct in the courtroom. Respondent contends to impose any heavier sanction on him would be to create a higher standard of conduct for experienced trial practitioners such as himself and would be a denial of equal protection. The argument

is without merit. All attorneys are held to the same standard of professional conduct but experience and maturity may be considered in mitigation of sanctions to be imposed on a particular attorney. In Getty, we noted that the attorney was relatively inexperienced and was contrite.

Respondent Williams, however, is an experienced practitioner. He was admitted to the bar in 1952 and has tried many cases. Between August 1981 and November 1985 in several different settings, respondent exhibited the misconduct here recounted, indicating his misbehavior cannot be explained by any momentary indiscretion. Except for some conduct at the panel hearing, he sees no reason to apologize and does not. He chooses to believe there is some conspiracy against him by the powers that be and prefers to find fault in others rather than himself.

We adopt the referee's recommendation

of a public reprimand for the racial slur. For the other misconduct, we impose the recommended 6 months' suspension. We do not think requiring respondent to take the professional responsibility examination for reinstatement would accomplish anything. It is enough for respondent to know that any repetition of his misconduct will not be tolerated.

IT IS, THEREFORE, ORDERED:

(1) Respondent James Malcolm Williams is hereby publicly reprimanded for unprofessional conduct occurring at the Sievert pretrial deposition;

(2) Responded is suspended from the practice of law for 6 months, commencing 7 days from the date of this opinion. The requirements of Rule 18(e) for reinstatement are waived; and

(3) Respondent shall pay $750 costs.

STATE OF MINNESOTA

IN SUPREME COURT

FILE NO. C8-85-2307

In the Matter of the Applicati on for the Discipline of James Malcolm Williams, an attorney at Law of the State of Minnesota	Findings of Fact Conclusions of Law and Recommendation

The above-entitled matter came before the undersigned, acting as Referee by appointment of the Minnesota Supreme Court, for hearing on the Petition for Disciplinary Action on May 28 and 30, 1986. The Director of Lawyers Professional Responsibility appeared by Senior Assistant Director Phillip D. Nelson. The Respondent appears personally and with his attorney James R. Martin. At the conclusion of the testimony the parties requested an opportunity to submit additional documentary evidence as well as a written final summation, proposed findings, and legal briefs.

Based on the evidence presented at the hearing, the arguments and briefs of coun-

sel, and all the documents on file herein, the Referee makes the following:

FINDINGS OF FACT

1. Respondent was admitted to the practice law in the State of Minnesota on June 10, 1952, and is currently licensed to practice law in the State of Minnesota. Since 1954, Respondent has had an extensive trial practice; he estimates he has tried more than 200 cases in his career.

2. Respondent represented Howard P. Sievert and Daun Sievert, husband and wife, in litigation arising out of their failed investment in a golf course. This case, Sievert vs. First National Bank in Lakefield, etal., was tried before the Honorable Walter H. Mann in 1982. The appellate decision in the case is reported at 358 N.W. 2d 409 (Minn. App. 1984).

COUNT I

3. In the course of the trial, which lasted approximately six weeks and gener-

ated a transcript of over 2,900 pages, the Respondent asked innumerable improper questions that were either argumentative, irrelevant, repetitious, or which assumed facts that were neither introduced into evidence prior to the question nor reasonably likely to be introduced later in the trial.

Specific instances of such misconduct which occurred in Respondent's cross-examination of David Meyer, a defendant in the case, are set forth in Paragraph E of the First Count of the Petition for Discipline.

4. In the course of his cross-examination of Mr. Meyer, Respondent repeatedly asked questions that were not relevant to the case and that degraded the witness. For example, after Mr. Meyer testified he did not know when he first received a fee as an attorney for the Defendant bank, Mr. Williams asked him:

> "Q. So its very possible then it was several years later before you got the first fees from the then

bank President?

A. I don't think that is possible at all.

Q. But you won't tell us when it was?

THE COURT: That's argumentative."

T.42. Similarly the Respondent asked Mr. Meyer a series of questions as to whether Mr. Meyer knew that the Plaintiff, Mr. Sievert, was purchasing some land for the purpose of building a golf course. After Mr. Meyer stated he knew the land was in the city limits of Lakefield, Mr. Williams asked:

"Okay, so you knew that he wasn't buying it to farm it?

A. I didn't mean to suggest that.

Q. Well, you mean to suggest that you don't want to admit that you knew he was going to try to build a golf course?

T. 98.

In cross-examining Mr. Meyer following his direct testimony in the defense case, Mr. Williams inquired into the witness' attendance at a religious college and his

degree in philosophy. He asked whether Meyer had developed a "philosophy of your own that is different from the philosophy of ordinary Christian ethics." When Meyer responded he had not, Mr. Williams continued:

> "So you still consider yourself a Christian?
> A. Yes.
>
> Q. And then when you took the oath, I believe the oath is that you swear to tell the truth so help you God?"

T. 1984. A final example appears at T. 2018-19:

> "Q. (By Mr. Williams) This is a mortgage deed, is it not, Mr. Meyer on the homestead of the Sieverts in the amount of $65,000?
>
> A. I believe it is, yes.
>
> Q. Well, isn't it? I am not asking you for your beliefs, I am asking you whether it is or it isn't.
>
> A. In order to say that I would have to assume that their homestead is on the property described in this mortgage. And that's the reason I answered it the way I did.
>
> Q. And you do not remember the document? You do not remember whether it is lot 10, block 10 Sherwood Acres Addition in Okabena is their house?
>
> MR. ROSEN: If your Honor please,

that is argumentative. The witness has stated that he believes it is.

"THE COURT: Objection sustained.

Q. (By Mr. Williams) All right, as a matter of fact you went over there the other night with your wife and looked it over, didn't you?

MR. ROSEN: Argumentative, Your Honor.

THE COURT: Objection sustained."

5. A review of the entire transcript supports the comments of Judge Mann at page 2015 in which he explained several of his evidentiary rulings sustaining objections on the grounds that the questions were argumentative:

"The Court would be less reluctant to give you an opportunity to ask questions in this subject matter if you wouldn't preface so many of your questions as if you are chastising the witness, as if you are demeaning him, as if you are incorporating in your question that unless he admits that he is stupid, you don't want to hear his answer. Every time you do that, it challenges counsel for the other side, it irritates the witness and we are not getting any facts. If you could somehow eliminate arguments in your question, at no time would I like

> to in any way limit the subject matter or the detail, but when it gets so entirely argumentative we will be here for months and months and we will accomplish nothing, absolutely nothing."

6. The Director has not proven that the Respondent repeatedly engaged in discourteous or degrading behavior to the Court nor that his summation improperly asserted his personal opinion as to the justness of his case, the credibility of the witnesses, or the culpability of the opposing parties. While not a model argument, the summation cannot be read as a argument based on Respondent's analysis of the evidence.

7. The Director has not sustained his burden of showing by clear and convincing evidence that Respondent's cross-examination of former Chief Justice Robert Sheran was so improper as to constitute professional misconduct.

Mr. Sheran testified as an expert witness for the defendant on plaintiff's mal-

practice claim against attorney David Meyer. Because Sheran's testimony concerned the professional and ethical obligations arising out of an attorney's representation of more than one client, inquiry into Sheran's sensitivity to the dual role of civil defense counsel where the attorney is retained by an insurance company was not so unreasonable as to fall within the scope of DR7-106(C)(2). Respondent could form a reasonable belief that the evidence would be admissible, and Respondent did not continue the line of questioning after objections were sustained.

The cross-examination of Mr. Sheran relative to the judicial ethics of former Justice James Otis is less justifiable, but again, given this record, I cannot find by clear and convicing evidence that there is no reasonable basis to believe the questions would be relevant to the case. Given the centrality of conflict of interest to

the issues of this case and to Mr. Sheran's opinion evidence, one could argue that inquiry into Sheran's opinion on Otis' participation in cases that would have a potential impact on the exposure of liability insurance companies would be relevant to evaluate Sheran's opinion. The Respondent asked only two questions directly on this point, and when Judge Mann advised him that the entire line of questioning was irrelevant, Respondent did not inquire further. Any additional testimony on this issue was raised by the witness, not by Respondent.

8. Respondent does not feel any remorse or regret for his trial conduct as set forth in Count I. He does not feel that his trial tactics were "overly aggressive" if the entire trial is taken into account.

COUNT II

9. On August 2, 1981, at a pre-trial deposition of Respondent's client Howard

Sievert, a disagreement arose between Respondent and opposing counsel William Rosen over Mr. Williams' right to hand his client a copy of the Complaint while Mr. Rosen was asking the client about some of the details of the Complaint. The following exchange took place:

> "MR. ROSEN: (To Williams) If you're going to hand the witness the Complaint so as to coach him --
>
> MR. WILLIAMS: You're asking --
>
> MR. ROSEN: If you're going to hand the Complaint to him to coach him we are going to see the judge.
>
> MR. WILLIAMS: Just get your foul odious body on the other side.
>
> MR. ROSEN: Then don't show the witness any more --
>
> MR. WILLIAMS: I'm giving the witness the complaint --
>
> MR. ROSEN: You're not entitled to coach the witness any further, you're not entitled to --
>
> MR. WILLIAMS: Don't use your little sheeny Hebrew tricks on me, Rosen.
>
> MR. ROSEN: Off the record --
>
> MR. WILLIAMS: No, on the record.
>
> MR. ROSEN: You son of a bitch.
>
> MR. COX: Let's call a recess.
>
> MR. ROSEN: Tell the Judge that I

called him a rotten son of a bitch for calling me a sheeny Hebrew and I want to go see the Judge right now.

MR. WILLIAMS: I want the record to show that he advanced across the table threatening to use physical violence on my client and on myself. And we are not going to the Judge now at all. If you want to go to the Judge, bring the Judge here."

T. 336-37.

10. The phrase "little sheeny Hebrew trick" used by Respondent was intended by Respondent and understood by Mr. Rosen as an ethnic slur.

11. The evidence does not support Respondent's claim that his use of the ethnic slur was a reasonable method of protecting Mr. Rosen from violence by the Respondent's client.

12. The allegations of professional misconduct contained in this Count were presented to the Lawyers Professional Responsibility Board by a written complaint dated September 22, 1981. On April 9, 1982, the Board, by a letter from Assistant Dir-

ector Janet Dolan, advised Respondent that the staff investigation indicated he had violated disciplinary rules and that that "conduct warrants the issuance of a private warning, pursuant to Rule 3(c)(2), Rules on Lawyers Professional Responsibility." The letter further advised Respondent that he had a right to not accept the warning and to demand a formal hearing before a panel of the Lawyers Professional Responsibility Board. Mr. Williams did not accept the warning and, by letter dated September 2, 1982, Assistant Director Janet Dolan advised Respondent "Today I reviewed this file and determined that the warning will be withdrawn and the file will be closed with a dismissal." The letter further advised Respondent that this was not a "commendation" of Respondent's activities but was based on the limited resources of the Board and the need to set priorities.

13. Respondent does not feel any rem-

orse or regret for his conduct as set forth in Count II, except he feels regret if Mr. Rosen felt Respondent was anti-Semitic.

COUNT III

14. On November 20, 1985 a hearing was held before a panel of the Lawyers Professional Responsibility Board to determine whether there was probable cause to believe that public discipline was warranted against Respondent for his conduct in the course of the Sievert case as discussed in the findings relative to Count I.

15. Respondent repeatedly engaged in obstreperous, disruptive, and abusive conduct at that hearing. As an example of such conduct, the Respondent, when upset that the chairman of the panel told him to stop talking, continually interrupted the chairman and finally accused the chairman of lying when the chairman stated that Respondent was argumentative and interrupting. (T. 36-41). Another example of

this behavior occurred after the panel indicated it had found probable cause to support the disciplinary action, Respondent state(d) that he considered the panel chairman "a disgrace to our profession."

The Referee has listened to an audio tape of the hearing as well as read the transcript. Respondent's behavior was outrageous and inexcusable.

16. The Respondent does regret that he "got upset" with the panel chairman. He has expressed regret at some of the things he said when upset.

Based on the foregoing, the Referee makes the following:

CONCLUSIONS OF LAW

1. The Respondent's cross-examination of David Meyer in the Sievert case as set forth in Count I, both in the specific instances noted in the petition and in its overall scope, violated DR7-106(C) (2) and (7).

2. Standing alone, neither Respondent's cross-examination of Robert Sheran nor his closing argument would constitute a violation of the disciplinary rules of the Code of Professional Responsibility.

3. The Respondent's ethical violations in the cross-examination of Mr. Meyer, whether viewed standing alone or in context of the entire Sievert trial, were sufficiently aggravated to justify public discipline.

4. Reasonable limitations on the right of trial attorneys to interrogate witnesses does not violate their first amendment rights. See, In re Ojala, 289 NW2d 108 (Minn. 1979). The standards of conduct for trial attorneys interrogating trial witnesses are not so vague as to violate their rights to due process. See, In re N.P., 361 NW2d 386 (Minn. 1985), appeal dismissed 88 L. Ed. 2d 330.

5. The Respondent's use of an ethnic

slur to opposing counsel as set forth in Count II of the Petition violated DR7-106 (C) (5) and (6).

6. Since Respondent failed to accept a warning for his violation of DR7-106(C) (5) and (6) and the warning was withdrawn, there has been no prior sanction for the misconduct so as to come within the limitation of In re Pearson, 383 NW2d 689 (Minn. 1986).

7. Respondent's conduct at the November 29, 1985 panel hearing violated Rule 3.5(h), Rule 4.4, and Rule 8.4(d), Minn Rules of Professional Conduct.

Based on the foregoing, the Referee recommends that the Respondent be public reprimanded for his unprofessional conduct as set forth in Count II. It is further recommended that the Respondent be suspended for a period of six months for his conduct as set forth in Counts I and III.

The attached memorandum is incorporated herein.

Dated this 18 day of December, 1986.

/s/William A. Johnson
WILLIAM A. JOHNSON
Referee by Appointment

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MEMORANDUM

This is a proceedings for professional discipline based on Respondent's conduct at trial, at a deposition, and before a panel of the Lawyers Professional Responsibility Board. At issue is the proper application of the Disciplinary Rules of the Code of Professional Responsibility to a lawyer's trial conduct, and the appropriate sanctions which should be imposed when a lawyer's misconduct is not caused by either dishonesty or incompetence but by his rejection of the limitations on trial advocacy set out in the Code.

Ironically, even though the statements which are alleged to constitute Respondent's misconduct were proved by certified transcripts of the proceedings, the first

issue that must be addressed is the requirement the professional conduct be proven by clear and convincing evidence. In re Rerat, 232 Minn. 1, 44 NW2d 273 (1950). Disciplinary Rules 7-106(C) (1), (2) and (7), which Respondent is alleged to have violated by his examination of witnesses at the Sievert trial, prohibit statements or questions that the attorney "has no reasonable basis to believe" are relevant or admissible and conduct that "intentionally or habitually" violates established rules. They do not, therefore, address merely asking improper questions, but are aimed at the lawyer's state of mind in asking the questions or at his habitual behavior.

Viewed in this light, the Director has not, by merely introducing a transcript of the trial, proven the alleged disciplinary violations in Respondent's cross-examination of Robert Sheran. Mr. Sheran was called as an expert witness by David Meyer,

a defendant in the Sievert case who Respondent alleged had committed legal malpractice. Part of Respondent's theory of professional malpractice was based on a claimed conflict of interest since Meyer had represented the Sieverts, a former partner of the Sieverts, and the bank that financed and ultimately foreclosed on the Sieverts' business. The alleged misconduct in Respondent's cross-examination of Sheran is contained in five pages of a 2900-page transcript. Respondent asked six questions about Sheran's views, both as a lawyer and as a Supreme Court Justice, on the propriety of a civil defense lawyer being identified solely as the attorney for the named Defendant even if the attorney had been retained by a liability insurer. Although the Director correctly asserts, and the trial court rules, that this was improper cross-examination, the transcript alone does not prove by clear and convinc-

ing evidence that Respondent had "no reasonable basis to believe" that the questions were relevant to the case.

The Director also alleged misconduct for questions Respondents asked Sheran about former Justice James Otis, who served on the Minnesota Supreme Court with Sheran. Respondent asked two questions about Sheran's views of the propriety of Otis deciding cases where any liability insurance companies were real parties in interest if Otis had substantial stock holdings in one liability insurance company. Again, although the challenged cross-examination was improper, the record in this proceeding does not prove by clear and convincing evidence that Respondent had "no reasonable basis to believe" the questions were proper when he asked them.

Finally, in evaluating these allegations of misconduct, one must consider the witness' and opposing counsel's responses

to Respondent's questions. On one occasion Sheran answered a question even after an objection to the question had been sustained. After another question, opposing counsel stated "I object, Your Honor, but I would ask that the witness be permitted to answer." (T. 2370). When the Court sustained this objection, counsel withdrew it and invited the witness to answer the question. Finally, after Respondent had moved off this line of questioning, Sheran himself interjected the subject into his answers and expended on his earlier statements. (T. 2381-82).

Given the brevity of this portion of the cross-examination of Sheran, the fact that Respondent did comply with the trial judge's instructions that the entire line was irrelevant and must be dropped, and the fact that the witness, as well as Respondent, evidently felt compelled to carry the issue further than was appropriate, I

cannot find by clear and convincing evidence that Respondent's conduct constituted a violation of the Disciplinary Rules.

Similarly, the transcript of Respondent's closing argument, notwithstanding that the Director properly points out several occasions in which the Respondent used phrases such as "I think" or "there is no question in my mind" or otherwise appear to tell the jury of his personal knowledge of the facts in the lawsuit, does not, standing along(sic), constitute clear and convincing evidence of the sort of intentional or habitual violation of rules which would constitute professional misconduct. Respondent's closing argument lasted more than two and a half hours and resulted in almost 75 pages of transcript. Merely listing 10 or 11 apparently improper statements in the course of a closing summation does not adequately prove professional misconduct, particularly where the trial judge neither interrupted the argument on

his own motion nor sustained any objections to the argument. Finally, although the Petition refers to instances in which the court admonished Respondent, innumerable instances in which the Respondent interrupted the judge, witnesses, and opposing counsel, and four or five instances in which Respondent argued with the trial judge, the transcript alone does not show by clear and convincing evidence a pattern of undignified or discourteous conduct which was degrading to the tribunal. On all these points, the cold words of the transcript are subject to enough different interpretations, depending on the manner in which they were spoken, that some evidence beyond the transcript itself is required to meet the Director's burden of proof.

The Respondent's cross-examination of David Meyer, however, does show a clear pattern of prolonged argumentative quest-

ioning and a failure to comply with the court's evidentiary rulings. Respondent's cross-examination of Mr. Meyer consumes some 500 pages of transcript and is replete with numerous instances in which the Respondent asked insulting and degrading questions which could have no possible relevance to the issues before the court, and failed to comply with the court's repeated instructions to cease the repetitious and argumentative questioning. Given the length and repeated nature of this questioning, coupled with the trial court's clear evidentiary rulings and instructions to Respondent, the transcript does constitute clear and convincing evidence of a violation of the disciplinary rules.

The Respondent's misconduct in accusing opposing counsel of using "little sheeny Hebrew tricks" is so clear that it needs no discussion. The Respondent's defense is that he felt he had to use the phrase

to keep his client from assaulting opposing counsel. The Referee is unpersuaded on this point and, even if it were true, there is no showing that an uttering an ethnic slur was a reasonable method to use to keep his client from assaulting opposing counsel.

The final Count against Respondent is the one best supported by the evidence. The Respondent's behavior at the probable cause hearing before a panel of the Lawyers Professional Responsibility Board was appalling. While specific improper statements and exchanges are demonstrated by the transcript, only by listening to the audio tape of the proceedings can one fully understand the extent of the Respondent's misconduct. Virtually from the beginning of the hearing, Respondent confused his legal objections to the proceedings with personal attacks on the panel members. At the close of the hearing, the Director, William Wernz, sta-

ted that Respondent's behavior was the most outrageous he had ever witnessed at a hearing. The observation appears apt.

Given Respondent's misconduct the question remains as to the appropriate discipline. If the use of the ethnic slur set forth in Count II were the only misconduct, the Referee would feel that a public reprimand would be appropriate. Given the nature of that misconduct, the Referee feels that a public reprimand is appropriate even though there is other misconduct requiring additional sanctions.

For Respondent's trial misconduct the question remains as to the appropriate discipline. If the use of the ethnic slur set forth in Count II were the only misconduct, the Referee would feel that a public reprimand would be appropriate. Given the nature of that misconduct, the Referee feels that a public reprimand is appropriate even though there is other misconduct

requiring additional sanctions.

For Respondent's trial misconduct as set forth in Count I and his misconduct before the probable cause panel as set forth in Count III, the Referee recommends suspension for a period of six months. If Respondent's misconduct at trial were the result of inexperience or a lack of training or knowledge on the rules of evidence one would hope that probation with mandatory education could resolve the problem. Respondent is an experienced trial lawyer, however, and it is unlikely that his failings were caused by a lack of knowledge of the rules of evidence.

The source of the misconduct, it appears, is best explained by the Respondent's own testimony before the panel of the Lawyers Professional Responsibility Board. Respondent evidently believes that there is a conspiracy of banking interests in Minnesota which seeks to intimate and sil-

ence him because of his representation of victims of the power structure. In serving his clients, the Respondent feels he is representing decency and justice against a powerful conspiracy. He is, therefore, not only free, but compelled, to use any weapon at his disposal to defend the interests of his clients against the economically powerful. Respondent asserts a right and duty to represent his clients zealously, not merely "zealously within the bounds of law." Canon 7, Code of Professional Responsibility.

The extent to which these views affect Respondent's professional conduct is demonstrated by Respondent's remarks after the panel indicated it found probable cause for these disciplinary proceedings. Respondent challenged the right of each member of the panel to participate. He objected first to the presence of an attorney member of the panel because she was employed

by Ramsey County and therefore "you have no business sitting on this because it is the establishment that is proceeding against me." A second member of the panel, who was not an attorney, should not have been on the panel because "his son is a lawyer who, who, who has contact with him, and he has no business being here. Finally, Respondent turned to the chairman of the panel and claimed:

> "Mr. Smith is -- represents her and has associations with 10 banks -- [the court reporter announces she is not able to stenographically record the proceedings] -- and he is a relative of I. A. O'Shaughnessy who practically controls the banking industry in the city of -- city of Saint Paul if not the State of Minnesota.
>
> "So I know I had a stacked hearing.
>
> "Don't try to cover up your evil by saying that there's something wrong with me."

(T.160).

If Respondent's deeply held views are the cause of his misconduct, probation or mandatory education is not reasonably cal-

culated to correct the problem. Accordingly, only a period of suspension with the likelihood of more severe sanctions should the misconduct be repeated is appropriate. In an earlier case, the Court suspended an attorney for a period of six months upon a finding that the attorney's conduct showed "a complete disdain for the disciplinary process." In re Cartwright, 282 NW2d 548, 552 (Minn. 1979). That is an accurate description of Respondent's behavior in this case, and a six month suspension is reasonable.

Dated this 18th day of December, 1986.

/s/Williams A. Johnson
WILLIAM A. JOHNSON
Referee by Appointment

STATE OF MINNESOTA
IN SUPREME COURT
C8-85-2307

OFFICE OF
APPELLATECOURTS
JAN 13 1988
FILED

In Re Petition for Disciplinary Action against James Malcolm Williams, Attorney at Law of the State of Minnesota.

JAMES MALCOLM WILLIAMS, Appellant,

v.

LAWYERS PROFESSIONAL RESPONSIBILITY BOARD, STATE OF MINNESOTA, Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that JAMES MALCOLM WILLIAMS, the appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Minnesota, dated October 23, 1987, publicly reprimanding the Appellant and suspending him from the practice of law for six months entered the 23rd day of October, 1987, effective as of October 30, 1987.

This appeal is taken pursuant to 28 U.S.C.A. §§ 1257(2).

Dated: January 12, 1988

/s/James Malcolm Williams
JAMES MALCOLM WILLIAMS
Pro Se Counsel for Appellant
212 West Franklin Avenue
Minneapolis, MN 55404
Telephone: (612)871-8885

STATE OF MINNESOTA)
)
COUNTY OF HENNEPIN)

LESLEE A. STEVENSON, being duly sworn, on oath says: That on the 13th day of January, 1988, she served copies of this Notice of Appeal to the Supreme Court of the United States by depositing true and correct copies hereof in the U.S.Mail in the City of Minneapolis, County of Hennepin, State of Minnesota, with postage prepaid, first class, in envelopes addressed to the following who are all the parties herein:

1. Minnesota Supreme Court, The Honorable Douglas Amdahl, Chief Judtice
   230 State Capitol
   St. Paul, MN 55155

2. Lawyers Professional Responsibility Board and William J. Wernz, Its Director
   520 Lafayette Road, First Floor
   St. Paul, Mn 55155-4196

and

3. Honorable Hubert H. Humphrey, III
   Attorney General of Minnesota
   State Capitol
   St. Paul, MN 55155

/s/Leslee A. Stevenson

Subscribed and sworn to before me
this 13th day of January, 1988.

/s/M. Jacquelin Stevenson
M. JACQUELIN STEVENSON
Notary Public-Minnesota
Hennepin County
My Commission expires Apr.21,1993

Supreme Court, U.S.
FILED
FEB 22 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1195

IN THE

Supreme Court of the United States

October Term 1987

JAMES MALCOLM WILLIAMS,

Appellant,

vs.

LAWYERS PROFESSIONAL RESPONSIBILITY BOARD, STATE OF MINNESOTA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MINNESOTA

MOTION TO DISMISS OF APPELLEE MINNESOTA LAWYERS PROFESSIONAL RESPONSIBILITY BOARD

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QUESTIONS PRESENTED

1. Did the Minnesota Supreme Court err in holding that Disciplinary Rule 7-106(C)(1), (2), (5), (6) and (7), Minnesota Code of Professional Responsibility, did not violate the first amendment of the United States Constitution as applied to an attorney who, notwithstanding the admonitions of a trial judge, repeatedly asked questions that were argumentative, irrelevant, repetitive, without foundation or degrading to the witness?

2. Did the Minnesota Supreme Court violate Appellant's first amendment rights by disciplining him for conduct which occurred at a disciplinary probable cause hearing and which the court characterized as obstreperous, disruptive and abusive, in violation of Rule 3.5(h), Rule 4.4 and Rule 8.4(d), Minnesota Rules of Professional Responsibility?

3. Did the Minnesota Supreme Court err in holding that Disciplinary Rule 7-106(C)(5) and (6), as applied to discipline an attorney for a racial slur against an opposing counsel when the opposing counsel was not disciplined for his response, did not violate the equal protection clause of the fourteenth amendment to the United States Constitution?

PARTIES TO THE PROCEEDING

Appellant: James Malcolm Williams is an attorney licensed to practice law in the State of Minnesota and was denominated respondent in the proceeding below.

Appellee: The Lawyers Professional Responsibility Board is the agency established by the Minnesota Supreme Court to investigate allegations of attorney misconduct and impairment and to prosecute disciplinary proceedings when warranted.

REPORT OF THE OPINION BELOW

The opinion below is reported at 414 N.W.2d 394 (Minn. 1987), *sub nom. In re Williams.*

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IN THE

Supreme Court of the United States

October Term 1987

NO. 87-1195

JAMES MALCOLM WILLIAMS,

Appellant,

VS.

LAWYERS PROFESSIONAL RESPONSIBILITY BOARD, STATE OF MINNESOTA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MINNESOTA

MOTION TO DISMISS OF APPELLEE MINNESOTA LAWYERS PROFESSIONAL RESPONSIBILITY BOARD

Appellee Minnesota Lawyers Professional Responsibility Board, pursuant to Rule 16 of the Rules of The Supreme Court of the United States, moves to dismiss the appeal herein on the ground that the questions presented were correctly resolved by the Minnesota Supreme Court and are so insubstantial that no further argument is needed.

CONSTITUTIONAL PROVISIONS AND RULES

The applicable provisions of the United States Constitution are the first and fourteenth amendments. The pertinent clauses are set forth in Appellant's Jurisdictional Statement. Jur. Stat. at 7.[1]

The applicable rules are Disciplinary Rule 7-106(C)(1), (2), (5), (6) and (7), Minnesota Code of Professional Responsibility, and Rules 3.5(h), 4.4, and 8.4(d), Minnesota Rules of Professional Conduct.[2] Jur. Stat. at 7-9.

STATEMENT OF THE CASE

Appellant appeals from a decision of the Minnesota Supreme Court publicly reprimanding him and suspending him from the practice of law for six months. *In re Williams*, 414 N.W.2d 394, 399 (Minn. 1987) (hereinafter *Williams*).

The disciplinary action against Appellant was based on three separate counts of unprofessional conduct. The first count concerned Appellant's conduct during a trial in which he represented the plaintiffs. *See Sievert v. First Nat'l Bank in Lakefield*, 358 N.W.2d 409 (Minn. Ct. App. 1984), *rev. denied* (Minn. Feb. 5, 1985). The Minnesota Supreme Court found that during Appellant's cross-examination of witnesses, his questions were repeatedly argumentative or without foun-

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[1] Throughout this motion, the abbreviation "Jur. Stat." refers to Appellant's Jurisdictional Statement.

[2] By order dated June 13, 1985, the Minnesota Supreme Court adopted the Minnesota Rules of Professional Conduct effective September 1, 1985, and repealed the Minnesota Code of Professional Responsibility effective August 31, 1985. Appellant's conduct which occurred prior to September 1, 1985, was charged under the old Code. Conduct subsequent to that date was charged under the new Rules.

dation, attempted to characterize unfairly the witnesses' testimony, or were crude attempts to demean or personally attack the witnesses. *Williams*, 414 N.W.2d at 396. After review of the 2900-page trial transcript, the court concluded that Appellant had engaged in calculated tactics to provoke and bait opposing counsel, intimidate and demean witnesses, and obfuscate the record. The Court held that to corrupt the trial process in this manner is prejudicial to the administration of justice and unprofessional conduct. *Id.* at 397.

Appellant argued that his trial conduct was an exercise in free speech and that to impose discipline amounted to unconstitutional censorship. In addressing his arguments, the Minnesota court distinguished an attorney's protected out-of-court speech as a private citizen from his speech in the court room as an officer of the court. The court properly determined that when an attorney is in court, engaged in court business, appropriate rules of professional conduct may govern an attorney's speech without offending the first amendment. *Id.* at 397.

The second count of unprofessional conduct involved Appellant's behavior at a pre-trial deposition of one of his clients in the *Sievert* matter. During a heated exchange with his opposing counsel, Appellant characterized opposing counsel's conduct as "your little sheeny Hebrew tricks." Opposing counsel then called Appellant a "son of a bitch." *Id.* at 397-398.

Appellant argued that disciplining him for his racial slur, when opposing counsel was not disciplined for his response, denied him equal protection under the law. The Minnesota court properly rejected this argument on the basis that the opposing counsel's response was understandably provoked by Appellant's own conduct. *Id.* at 398.

The third count of unprofessional conduct against Appellant involved his behavior at a hearing before a three-member panel of the Lawyers Professional Responsibility Board. The purpose of the hearing was to determine whether probable cause existed for disciplining Appellant for his conduct at the *Sievert* trial. During the hearing, Appellant repeatedly interrupted the panel chair, accused him of lying, and called him "a disgrace to our profession." The Minnesota court found that Appellant had engaged in obstreperous, disruptive and abusive conduct in violation of Rules 3.5(h), 4.4 and 8.4(d) of the Minnesota Rules of Professional Conduct. *Id.* at 398.

Appellee submits this motion to dismiss the appeal herein on the ground that the Minnesota Supreme Court correctly resolved Appellant's questions and that Appellant has failed to raise a substantial question warranting review by this Court.

ARGUMENT

I. THE MINNESOTA SUPREME COURT'S DECISION THAT DISCIPLINING APPELLANT FOR HIS IN-COURT UTTERANCES DID NOT DEPRIVE HIM OF HIS RIGHT TO FREE SPEECH IS PLAINLY CORRECT, AND APPELLANT'S ARGUMENTS TO THE CONTRARY FAIL TO RAISE A SUBSTANTIAL FEDERAL QUESTION.

The Minnesota Supreme Court correctly found no merit to Appellant's argument that disciplining him for his in-court utterances deprived him of his first amendment right to free speech. Disciplinary Rule 7-106(C)(1), (2), (5), (6) and (7) of the former Minnesota Code of Professional Responsibility and Rules 3.5(h), 4.4 and 8.4(d) of the Minnesota Rules of Professional Conduct do not offend the first amendment. First, the rules are not vague because they sufficiently inform attorneys of prohibited conduct. Second, the rules are not overbroad because they place no greater limitation on an attorney's in-court utterances than is necessary or essential to protect the fair administration of justice. Finally, the rules were properly applied to Appellant's utterances both at the *Sievert* trial and at his probable cause hearing, because the utterances for which he was disciplined were clearly unprotected by the first amendment.

A. The Rules Of Professional Conduct At Issue Here Are Not Vague Because They Give Attorneys Notice Of The In-Court Utterances Which They Proscribe.

The rules at issue herein are not impermissibly vague. As the following will show, Disciplinary Rule 7-106(C) gives specific and definite notice to attorneys of the speech it proscribes by its reference to local rules of practice and decorum

and the rules of evidence. Rules 3.5(h), 4.4 and 8.4(d) give notice of the kind of conduct they proscribe by their use of standards which take on clarity and precision in the context of the traditions of legal profession.

This Court has long recognized that "it is difficult, if not impossible, to enumerate and define with legal precision, every offense for which an attorney or counselor ought to be removed." *Ex Parte Secombe*, 60 U.S. (19 How.) 9, 14 (1856). Yet essential due process guarantees apply fully to attorney disciplinary proceedings. *In Re Ruffalo*, 390 U.S. 544, 550 (1968).

The due process standards applicable to rules governing attorney conduct were summarized by Justice Brennan in his partial dissent and partial concurrence in *Zauderer v. Office of Disciplinary Counsel*, —— U.S. ——, 105 S.Ct. 2265, 2289-90 (1985) (n.8 omitted):

> A regulation that "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926). The Fourteenth Amendment's Due Process Clause "insist[s] that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972). This requirement "applies with particular force in review of laws dealing with speech," *Hynes v. Mayor of Oradell*, 425 U.S. 610, 620 (1976); "a man may be the less required to act at his peril here, because the free dissemination of ideas may be the loser," *Smith v. California*, 361 U.S. 147, 151 (1959).
>
> . . .

> Given the traditions of the legal profession and an attorney's specialized professional training, there is unquestionably some room for enforcement of standards that might be impermissibly vague in other contexts; an attorney in many instances may properly be punished for "conduct which all responsible attorneys would recognize as improper for a member of the profession." [*In re Ruffalo*, 390 U.S.] at 555 (WHITE, J., concurring in result)*
>
> * Arguably vague regulations may take on "definiteness and clarity" in the context of the profession's "complex code of behavior," and an attorney is properly charged with knowledge of all applicable disciplinary rules and ethical guidelines. *In re Bithoney*, 486 F.2d 319, 324-325 (CA1 1973). See also Comment, ABA Code of Professional Responsibility: Void for Vagueness?, 57 N.C.L. Rev. 671, 676-680 (1979).

In that portion of *Ruffalo* cited by Justice Brennan, Justice White considered whether it was proper to disbar Ruffalo under a general standard of the Court of Appeals for the Sixth Circuit. The standard included "conduct unbecoming a member of the bar of the court." *Ruffalo*, 390 U.S. at 555. Justice White reasoned that even when a disbarment standard is as unspecific as that of the Sixth Circuit, members of a bar can be assumed to know that certain kinds of conduct, generally condemned by responsible men, will be grounds for disbarment, including conduct which all responsible attorneys would recognize as improper for a member of the profession. *Id.* at 555.

In another case, the Court stated as follows regarding the meaning of "conduct unbecoming a member of the bar":

> Read in light of the traditional duties imposed on an attorney, it is clear that "conduct unbecoming a member of the bar" is conduct contrary to professional standards that shows an unfitness to discharge continuing obligations to clients or the courts, or conduct inimical to the administration of justice. More specific guidance is provided by case law, applicable court rules, and "the lore of the profession," as embodied in codes of professional conduct.

In re Snyder, —— U.S. ——, 105 S.Ct. 2874, 2881 (1985) (note omitted). Moreover, *Snyder* acknowledged that an attorney's obligation to avoid conduct that is "prejudicial to the administration of justice" is almost universally recognized in American jurisdictions. *Id.* note 6.

In the present case, the disciplinary rules challenged by appellant clearly put responsible attorneys on notice of the speech they prohibit so that attorneys may act accordingly. The pertinent provisions of Disciplinary Rule 7-106(C)[3] provide as follows:

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[3] As noted above, the Minnesota Supreme Court adopted the Minnesota Rules of Professional Conduct, which became effective on September 1, 1985 and simultaneously repealed the Code of Professional Responsibility. All of Appellant's conduct at the *Sievert* trial which forms the basis of his suspension under Count I occurred while the old Code was still in effect. The prosecuting attorney for Appellee charged the conduct as unprofessional under Rule 7-106 of the old Code, and the referee utilized Rule 7-106 in that portion of his report to the Supreme Court concerning the *Sievert* trial. Jur. Stat. at 32a. In its opinion, however, the Minnesota court cites Rules 3.5(h), 4.4, and 8.4 as the rules "found to have been violated" by Appellant's trial conduct. *In re Williams*, 414 N.W.2d at 395, n.2; Jur. Stat. at 3a. Despite this ambiguity, it must be assumed that the Minnesota court concluded that Appellant's trial conduct was unprofessional under Rule 7-106(C) of the old Code of Professional Responsibility, since the *Sievert* trial

In appearing in his professional capacity before a tribunal, a lawyer shall not:

(1) State or allude to any matter that he has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence.

(2) Ask any question that he has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person.

. . .

(5) Fail to comply with known local customs of courtesy or practice of the bar or a particular tribunal without giving to opposing counsel timely notice of his intent not to comply.

(6) Engage in undignified or discourteous conduct which is degrading to a tribunal.

(7) Intentionally or habitually violate any established rule of procedure or of evidence.

Minnesota Rules of Professional Conduct 3.5(h), 4.4 and 8.4(d) provide as follows:

Rule 3.5(h): A lawyer shall not engage in conduct intended to disrupt a tribunal.

Rule 4.4: In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

---

conduct was charged and considered by the Referee under Rule 7-106(C). Moreover, Appellant has used Rule 7-106(C) to frame his questions to this Court and has not raised any issues which may be implicated by the application of the new Rules to his conduct at the *Sievert* trial.

> Rule 8.4: It is professional misconduct for a lawyer to . . . (d) engage in conduct that is prejudicial to the administration of justice.

Disciplinary Rule 7-106(C) clearly informs an attorney that certain in-court utterances, including questions to witnesses will be unprofessional conduct. Section (1) proscribes stating or alluding to irrelevant and inadmissible matters. Section (2) proscribes questions that are irrelevant or intended to degrade witnesses or other persons. Terms such as "relevant" and "supported by admissible evidence" are defined by rules of evidence and case law so that the rule's proscriptions are clear to all members of the bar as a result of their professional training. The term "to degrade a witness or other person" is given clarity by an attorney's traditional obligation to treat witnesses and parties with courtesy and to avoid questions that are designed to demean or humiliate.

Section (5) of Rule 7-106(C) incorporates local customs of courtesy or practice. Such customs are codified in part in Minnesota in the Rules of Uniform Decorum in the District Court and the Minnesota Civil Trialbook.[4] All members of the Minnesota bar may be charged with knowing their contents.

Section (6) proscribes undignified or discourteous conduct which degrades the tribunal. The speech which the rule would proscribe is defined by the traditional code of behavior, known to all attorneys, which condemns rude, insulting, and familiar address to the court. Finally, section (7) is given clarity and precision by its explicit incorporation of the rules of procedure and evidence for the Minnesota courts.

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[4] The Rules of Uniform Decorum and the Minnesota Civil Trialbook may be conveniently located in *Minnesota Statutes* (1986), Volume 9, pages 314-340.

Disciplinary Rules 3.5(h), 4.4, and 8.4(h) are also not facially vague. As noted above, the rules cannot enumerate or define with precision every offense which rises to unprofessional conduct. The rules do, however, incorporate standards by which attorneys may know which utterances are proscribed. Rule 3.5(h) only prohibits in-court speech which disrupts a tribunal. Rule 4.4 only prohibits in-court speech whose purpose is to embarrass, delay or burden a third person. Finally, Rule 8.4 only prohibits in-court speech which is prejudicial to the administration of justice.

Thus, the standards incorporated in Rules 3.5(h), 4.4, and 8.4(d) operate to proscribe speech according to its purpose, rather than its content. The impermissible purposes, such as "to disrupt a tribunal" or "to embarrass, delay, or burden a third person," are not impermissibly vague in the context of the profession's code of behavior. *See Zauderer*, 105 S.Ct. at 2290, n.9. Members of the Minnesota bar can be assumed to know that certain kinds of speech, uttered in the court room for the proscribed purposes, would be recognized by all responsible attorneys as improper for a member of the profession. *See 4 Ruffalo*, 390 U.S. at 555.

In conclusion, the disciplinary rules at issue here are not impermissibly vague. Rule 7-106(C) explicitly incorporates local rules of decorum, procedure and evidence. Moreover, both Disciplinary Rule 7-106(C) and Rules 3.5(h), 4.4, and 8.4(d) employ standards which are clear and precise in the context of the legal profession.

B. The Rules Are Not Overbroad Because They Only Proscribe In-Court Utterances Which Interfere With The State's Legitimate Interest In The Fair Administration of Justice.

Rules 3.5(h), 4.4 and 8.4(d) are not overbroad.[5] The rules are narrowly drawn so that they only proscribe in-court speech which would interfere with the state's legitimate interest in the fair administration of justice.

The Court has never addressed the question of when rules of professional conduct deny first amendment guarantees of free speech when such rules govern the in-court speech of attorneys. However, a clear and precise enactment may nevertheless be overbroad if in its reach it prohibits constitutionally protected conduct. *Grayned v. City of Rockford*, 408 U.S. 104, 114 (1972). Enactments which regulate speech are not overbroad if they are narrowly tailored to further the state's legitimate interest. *Id.* at 116-17. The Court's dicta in the following two cases establishes that protecting the orderly administration of justice is a sufficiently compelling interest which allows the state to regulate the content of in-court speech that jeopardizes that interest. Since the regulations at issue are narrowly drawn to serve only that interest and prohibit only speech that is properly subject to regulation, they are therefore not overbroad.

In *Fisher v. Pace*, the Court affirmed a decision of the Supreme Court of Texas which sustained a trial court's sum-

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[5] Since the Code of Professional Responsibility was repealed effective August 31, 1985, Disciplinary Rule 7-106(C) no longer regulates the in-court speech of attorneys in Minnesota. It is therefore not necessary to consider whether Disciplinary Rule 7-106 was overbroad. It's constitutionality, as applied, is discussed below.

mary conviction of an attorney for contempt in the face of the court. 336 U.S. 155, 159 (1949). The conduct at issue was the attorney's continuing a course of argument in his closing summation to a jury after objections had been repeatedly sustained by the bench. *Id.* at 156-59. Writing for the majority, Justice Reed noted as follows:

> The occurrence must be viewed as a unit in order to appraise properly the misconduct, and the relationship of the petitioner as an officer of the court must not be lost sight of.

Id. at 161. Commenting on the attorney's failure to conform his summation to a local rule after repeated rulings by the trial judge, the Court stated:

> It was the duty and power of the trial judge in the trial of the compensation suit to determine the type, manner and character of the argument before the jury. Of course his rulings thereon were subject to review in the appellate courts, but he has the power to make them whether right or wrong. If they are erroneous the injured party has the plain, simple and adequate remedy of appeal. It was thus the duty of counsel to abide by his decisions even if erroneous; and if any rights of his clients were violated the remedy was by exception and appeal. Any other procedure would result in mockery of our trial courts and would destroy every concept of orderly process in the administration of justice.

Id. at 161.

The themes first articulated in *Fisher* in 1949 were recently reiterated in the Court's dicta in *In re Snyder*, —— U.S. ——, 105 S.Ct. 2874, 2881 (1985):

> As an officer of the court, a member of the bar enjoys singular powers that others do not possess; by virtue of

> admission, members of the bar share a kind of monopoly granted only to lawyers. Admission creates a license not only to advise and counsel clients but to appear in court and try cases; as an officer of the court, a lawyer can cause persons to drop their private affairs and be called as witnesses in court, and for depositions and other pretrial processes that, while subject to the ultimate control of the court, may be conducted outside courtrooms. The license granted by the court requires members of the bar to conduct themselves in a manner compatible with the role of courts in the administration of justice.

Thus the Court has viewed attorneys as having a special relationship to the courts because of the attorney's status as a participant in the judicial system. As participants, attorneys have access to appellate forums in which to redress the errors of courts or to call attention to injustice. Attorneys therefore have an obligation to abide by judicial decisions and to maintain decorum. An attorney's failure to do so threatens orderly process in the administration of justice.

Although this Court has not defined the scope of first amendment protection for an attorney's in-court speech, two lower courts have considered the question with respect to statements made in pleadings filed with the court which may be viewed as in-court utterances. In the context of a contempt proceeding, the United States District Court for the Western District of Louisiana held that irrelevant, insulting, abusive or grossly discourteous language in criticism of a judge or officer of the court, in a pleading filed with the court, has no constitutional protection. *Spencer v. Dixon*, 290 F.Supp. 531, 537 (W.D. La. 1968). The Iowa Supreme Court has held that an accusation in a filed pleading that the court has practiced fraud and deceit is not protected by the first amendment. *In*

re Freichs, 238 N.W.2d 764 (Iowa 1976). Although these decisions were not tested by review in this Court, they do illustrate that disciplinary rules which regulate an attorney's in-court statements reach only so far as is necessary to protect orderly process and the fair administration of justice.

Rules 3.5(h), 4.4 and 8.4(d) of the Minnesota Rules of Professional Conduct are not overbroad. They place no greater limitation on an attorney's in-court speech than is necessary to protect orderly process in the fair administration of justice. Rule 8.4(d) explicitly incorporates that standard in its text. Thus Rule 8.4(d) cannot be viewed as overbroad, since the rule can only proscribe speech that is prejudicial to the administration of justice. Such speech cannot have first amendment protection.

Rules 3.5(h) and 4.4 do not explicitly incorporate the above standard. However, Rule 3.5(h), by proscribing only conduct which is intended to disrupt a tribunal, cannot be construed to reach protected speech. Language employed to disrupt a tribunal would necessarily be language which threatens orderly process and the fair administration of justice. Such language is outside the scope of first amendment protection.

Similarly, Rule 4.4 cannot be construed as overbroad. It can only be read to proscribe in-court speech which has as its purpose to embarrass, delay or burden a third person, such as a witness in a court proceeding. In-court utterances whose purpose is to embarrass or burden a witness can only rationally be viewed as threatening orderly process in the fair administration of justice.

The rules are thus not facially overbroad. The rules only proscribe speech which is prejudicial to the administration of justice. Appellant has therefore failed to raise a substantial first amendment question, and his appeal should be dismissed.

C. The Rules, As Applied To Appellant's In-Court Utterances, Did Not Deprive Him Of His Right To Free Speech, Because His Utterances Were Patently Beyond The Scope Of First Amendment Protection.

As noted above, the Court has not delineated the scope of first amendment protection for an attorney's in-court speech. This case presents no opportunity to do so. The in-court utterances which resulted in Appellant's suspension are so patently unprofessional that they cannot be used to illuminate the content of protected in-court speech.

Several examples of Appellant's unprofessional speech at the *Sievert* trial are set forth in the margin of the Minnesota court's decision. *Williams*, 414 N.W.2d at 396; Jur. Stat. at 4a-7a. Further examples are set forth in the Referee's report to the Minnesota Supreme Court. Jur. Stat. at 21a-24a. The full 2900-page transcript of the *Sievert* trial was also reviewed *de novo* by the Minnesota court.

It is clear from the Court's decision that Disciplinary Rule 7-106(C) was not applied to any in-court utterances that could rationally be viewed as protected by the first amendment. Appellant was not disciplined for any single improper question to a witness. Rather, Appellant's in-court utterances, viewed as a whole, rose to unprofessional conduct because they tainted the record of the trial:

> An argumentative question is improper and unfair because it argues the evidence rather than seeking to elicit evidence from the witness. Argument is reserved for counsel to make, not to the witness, but to the trier of fact after the facts are adduced. During the stress of a trial, for one reason or another, it may happen that argumentative questions will be asked, but the trial judge is

> ordinarily able to handle the situation by sustaining an objection, striking improper remarks, or cautioning the jurors.
>
> But here Respondent's questions went far beyond what is excusable or tolerable. Almost every page of the transcript of Respondent's cross-examination of Mr. Meyer shows improper questioning, which in turn led to inevitable objections by opposing counsel, conferences at the bench or in chambers, confusion, posturing before the jurors, and a record tainted with unfounded insinuations and innuendo.

Williams, 414 N.W.2d at 396-397. The court concluded that Respondent engaged in calculated trial techniques to provoke and bait opposing counsel, intimidate and demean witnesses, and obfuscate the record. The court correctly held that to corrupt the trial process in this manner is prejudicial to the administration of justice and therefore unprofessional conduct. *Id.* at 397.

At Appellant's disciplinary probable cause hearing, his unprofessional speech included the following:

> 1. Persisting in interrupting the chairman after being told to stop talking;
>
> 2. Accusing the chairman of lying when the chairman said Appellant was argumentative and interrupting; and
>
> 3. Stating that he considered the panel chairman "a disgrace to our profession."

Williams, 414 N.W.2d at 398. The Minnesota court, after listening to an audio tape of the proceeding and reading the transcript, concluded that Appellant had intentionally sought to disrupt the hearing. *Id.*

Appellant's in-court utterances in both forums, viewed as whole occurrences, caused such an egregious subversion of orderly process that they clearly constituted a serious and imminent threat of interference with the fair administration of justice. Thus, the Minnesota court did not err in concluding not only that Appellant's in-court speech constituted unprofessional conduct but also that such speech was not protected by the first amendment. Appellant has therefore failed to raise a substantial question, and his appeal should be dismissed.

II. THE MINNESOTA SUPREME COURT'S DECISION THAT DISCIPLINING APPELLANT FOR A RACIAL SLUR AGAINST AN OPPOSING COUNSEL DID NOT DEPRIVE HIM OF HIS RIGHT TO EQUAL PROTECTION UNDER THE LAW IS PLAINLY CORRECT, AND APPELLANT'S ARGUMENTS TO THE CONTRARY FAIL TO RAISE A SUBSTANTIAL FEDERAL QUESTION.

The Minnesota Supreme Court correctly held that disciplining Appellant for using a racial slur against his opposing counsel, when the opposing counsel was not disciplined for his response, did not deny Appellant the right to equal protection under the law as guaranteed by the fourteenth amendment.

A claim of selective prosecution must meet two requirements: first, the enforcement system must have a discriminatory effect; and two, the enforcement system must be motivated by a discriminatory purpose. *Wayte v. U.S.*, —— U.S. ——, 105 S.Ct. 1524, 1531 (1985).

In the present case, Appellant has not met the required test. Indeed, he did not even attempt to establish in the court below that Appellee's "enforcement system" is discriminatory. Nor could he make such a showing. His claim is based on a single

prosecutorial decision which was patently sound in view of Appellant's provocative use of the phrase, "your little sheeny Hebrew tricks."

Appellant has thus failed to raise a substantial federal question regarding selective prosecution. His appeal should therefore be dismissed.

CONCLUSION

For the foregoing reasons, Appellee respectfully submits that the questions presented herein were correctly decided by the Minnesota Supreme Court and that this appeal presents no substantial question warranting review by this Court. The appeal should therefore be dismissed.

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Respectfully submitted,

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